Supreme Court, U.S.
FILED
OCT 20 1999
OFFICE OF THE CLERK

No. 98-1811

In The
Supreme Court of the United States

October Term, 1998

Alexis Geier, et al.
Petitioners

vs.

American Honda Motor Company, Inc., et al.,
Respondents

On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST

The Attorneys Information Exchange Group (AIEG) is an organization of attorneys who practice civil litigation throughout these United States. AIEG was founded in the mid-1970's by attorneys who were then representing burn victims who were motorists in Ford cars and trucks. Its founding members dedicated themselves, and this organization, to the creation of a private cooperative entity, which would serve to educate and coordinate the acquisition of technical information germane to the fair and honest representation of Americans who have suffered serious or catastrophic injury as a result of defective designs in motor vehicles. Over the years, AIEG members have represented the victims of such infamous vehicles as the Ford Pinto, General Motors cars and pick-up trucks with poorly designed fuel systems (e.g., side saddle fuel tanks), Audi vehicles with uncontrollable acceleration, and thousands of vehicles and trucks with transmission flaws allowing the transmission to unknowingly slip from Park to Reverse.

Members of AIEG on a daily basis are involved in pursuing products liability claims typically stemming from faulty design or manufacture of motor vehicles. Our clients are those Americans who have suffered catastrophic injury needlessly. In the prosecution of these common law claims, we are called upon to study and address the relationship between vehicular design, injury causation and any relevancy of compliance with federal standards promulgated pursuant to the Safety Act. *Most often, it has been found that there is very little relationship between a vehicle's compliance with these standards and the safety performance of these products in real world accidents.* AIEG's members have a vital interest in the effect this decision may have on its members and the clients they represent because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal safety standards, thereby resulting in the sale of vehicles which may not be reasonably safe. This circumstance allows some manufacturers to ignore their common law responsibility to build and sell crashworthy vehicles, and it has resulted in injuries and deaths to thousands of Americans

who should not have otherwise been injured or killed.[1]

II. SUMMARY OF THE ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle performance which would provide basic and minimum safety for vehicles sold in this country. Simultaneously, Congress authorized the establishment of a government agency to develop and promulgate these regulations--which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the states had promulgated, and which required automobile manufacturers to only sell cars in their respective states if these vehicles were equipped with certain devices, such as front seat seatbelts. Congress was asked by some facets of the motor vehicle industry and safety community to pass legislation which would have the effect of eliminating diverse state regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined as "minimum standard[s] for motor vehicle performance."[2]

As the National Transportation Safety Board reported in 1970[3]:

> "The imposition of Federal Motor Vehicle Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, but it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market."

At the same time Congress was writing this legislation, courts around the country and legal scholars were applying common law principles to the issue of a motor vehicle manufacturers' duty to build vehicles which are crashworthy. Larsen v. General Motors Corporation, 397 F.2d 495 (8th Cir. 1968). See generally, Hoening, Resolution of "Crashworthiness" Design Claims, 55 St. John's L.Rev. 633 (1981).

As a result of Congress' awareness of personal injury litigation invoking the application of the common law to motor vehicle design safety, and the promulgation of some non-uniform state safety legislation, the Safety Act addressed both issues. The Safety Act and its legislative history establish that Congress did not want conflicting safety regulations promulgated by state and federal agencies. This was made quite clear by the inclusion of a preemption provision; yet, Congress also specifically provided that the Safety Act would not undermine the common law:

> "While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. § 1392(d), compliance with the federal regulations does not exempt any person from any liability under common law, 15 U.S.C. § 1397(c) (1966)." Dorsey v. Honda Motor Company, Ltd., 655 F.2d 650, 654 (5th Cir. 1981).

The preemption section of the Safety Act prohibits any state or political sub-division from establishing any safety standard dissimilar to published federal standards. Virtually every federal and state appellate court has concluded that the language and intent of the preemption section cannot be read to extend to common law

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[1] The parties have consented to the filing of Amicus Briefs. This Brief has been written only by counsel to this Amicus and no funds have been provided by anyone for its preparation or submission.

[2] 15 U.S.C. 1391 (2) (1966, 1988 & Supp. III 1991).

[3] *Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards*, Report No. NTSB HSS 70 1 (June 3, 1970), (see page 4).

damage claims. Unlike the language used by Congress in other legislation, here Congress expressed its intent to effect only the conduct of states and political subdivisions, rather than juries. In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the state activity which it intended to preempt, i.e., activities of state and political subdivisions. And, Congress also expressed its intent to preserve the common law by stating that compliance with federal safety standards does not exempt any person from any liability under common law. 15 U.S.C. § 1397(c).

Congress intended by its language to establish minimum standards which all companies were required to meet before they can market their products in the United States. On the other hand, since these are only minimum standards, Congress intended the "threat" of common law liability to spur manufacturers to do much more than simply comply with federal standards--or suffer potential liability for injury caused by not providing the most reasonably safe product possible.

When Congress passed the Safety Act it did not establish any sort of administrative remedy for Americans injured by defectively designed and manufactured products, because it was then viewed that there were available common law remedies to address any such harm.

Over the past thirty years, the federal standards have, with few exceptions, not changed. A prime example of the stagnant nature of these standards is FMVSS 208. First promulgated as a "passive restraint" regulation in the early 1970's, the effective date of this standard was stalled, delayed, eliminated and then reissued many, many times. These delays often reflected the very political nature of the process of promulgating federal regulations. See, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 163 U.S. 29, 103 S.Ct. 2856. Despite these delays in the effective date requiring passive safety features in vehicles, some manufacturers voluntarily produced and sold cars in this country with passive (air bag) safety systems. Car

companies including General Motors Corporation, Ford Motor Company, Mercedes Benz and Volvo Corporation introduced air bag systems in their vehicles long before they were required by FMVSS 208.[4]

Despite the relative stagnation of federal standards, vehicle manufacturers have continued to make safety improvements in their products. Obviously, technology and safety have been driven by the market place and the potential exposure to common law liability.

When Congress enacted the Safety Act it did not provide protection against common law liability--which would have essentially granted these corporations status as "protected" businesses. There was never any indication that Congress had any interest in precluding this facet of industry from the time tested criteria of "due care." Congress obviously appreciated the relationship between governmental regulation and our civil justice system, which provides all Americans with access to our courts to redress civil wrongdoing. Until the birth of "no air bag litigation," not one appellate court in this country had ever entertained the notion that Congress chose to preempt common law liability in the field of motor vehicle product design. The several state and federal appellate courts which have, during the past ten years, studied the question of federal preemption of "no air bag claims" have run the gamut on both their decisions and reasoning. However, one conclusion seems to be clear from all of these cases, including those finding some form of preemption: they have treated "no air bag claims" as a unique issue in the context of whether or not Congress or NHTSA intended or planned to preempt this specific common law claim. There has been no suggestion that a finding of federal

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[4] GM and Ford sold thousands of cars with air bags in the early 1970's. Unfortunately, because of poor sales, these two companies discontinued those safety features by 1976. Mercedes Benz and other European car companies began selling cars in the United States with air bag systems in the early to mid-1980's. The regulation at issue here did not require air bags or any passive restraint to be installed until the phase-in began in 1987.

preemption under these circumstances could just as easily be obtained in a case involving a common law claim that an air bag--or any other component that complies with federal standards--was defectively designed. Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992).

When the Lower Court visited the question of federal preemption in this instance, it did so with a path of analysis which this Court provided in Cipollone vs. Liggett Group, Inc., 112 S.Ct. 2608 (1993), Freighliner Corporation v. Myrick, 514 U.S. 280 (1995), and Medtronic, Inc. v. Lohr, 116 S.Ct. 2240 (1996). Nevertheless, the Lower Court chose to ignore the *Express* statements of Congress, which preclude a finding of preemption, and instead the Court followed the path of implied federal preemption, finding that a "no air bag claim" would undermine and conflict with NHTSA's intent to provide manufacturers with several design choices to comply with FMVSS 208. We disagree with this conclusion. The Lower Court erroneously found implied conflict preemption on the basis that allowing this plaintiff's common law claim would force a manufacturer to install air bags, when the applicable standard gave manufacturers a choice between seat belts and air bags. This perceived "conflict" is not true. As was true in the case involving Karen Silkwood, here too, the manufacturer is not being forced to do any more than meet federal standards. All that may occur in a given case where a manufacturer has only complied with federal safety standards is that a jury may hold the company liable for not doing more than is required by government regulation.

At the heart of the rationale for finding no preemption of the plaintiff's claim, and the reason that courts throughout the country have, in increasing numbers, rejected this defense are the observations of the Missouri Court of Appeals:

> "[I]n the Safety Act, Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause [15 U.S.C. § 1392(d)] and the other one of which we call a savings clause [15 U.S.C. 1397(k)]. Our terminology

> notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not preempted.
>
> "This analysis is consistent with a basic rule of statutory construction that legislative intent is discerned by examining a statute's provisions as a whole..."
>
> * * * *
>
> "Clearly, Congress mandated in 15 U.S.C. § 1397(k) that the Safety Act was not to serve as a shield to any liability under common law..." Loulos v. Ford Motor Company, 882 S.W.2d 149 (Mo. App. 1994).

The Safety Act *expressly preserves* this plaintiff's common law action. The purpose of the Safety Act is to reduce accidents, deaths and injuries. The Safety Act authorizes the issuance of minimum standards. The Express Preemption Clause in the Act supports the conclusion that implied preemption is not warranted. That is exactly what Congress declared when it promulgated the Common Law Savings Clause in the Act. Thus, the presumption against preemption must prevail here absent a Congressional statement to the contrary.

Further, even without considering the effect of the Savings Clause, there cannot be implied "conflict" preemption here because the FMVSS does not require or prohibit specific equipment which the plaintiff alleges should have been installed; this common law action would not frustrate the purposes and objectives of Congress; and the NHTSA has not ordered manufacturers to refrain from using air bags as a supplemental safety system.

We ask the Court to establish for all litigants the clear proposition that because Congress never intended to preempt any common law remedy for defective design and manufacture, courts

cannot impose their will upon injured consumers and preempt these claims--despite a manufacturer's satisfaction of the minimum safety regulations. There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to satisfy a very basic level of crash safety, and allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in crash safety. In fact, such lawsuits can only serve to **promote** improvements in design protection.

The issue of design defect in relation to the question of compliance with a standard such as FMVSS 208 is not whether every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in his or her car, and seek to punish the manufacturer for choosing an option federal law deemed acceptable to meeting certain safety goals. Rather it is whether Congress expressly intended to shield these manufacturers from tort liability when they do no more for safety than the bear minimum required by NHTSA. We think the answer to this question is quite clear: there is no immunity from common law liability for mere compliance with minimum safety regulations.

III. ARGUMENT

A. BACKGROUND

Nearly thirty years ago, the publication of Ralph Nader's Unsafe at Any Speed (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to what was then a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, to the passage of the Safety Act of 1966. In the intervening years, as motor vehicle design defect litigation has grown, manufacturers have consistently argued to courts that when their vehicles have complied with applicable federal motor vehicle safety standards, they cannot be held liable for failing to do more. And, equally

consistently, courts have rejected that argument. Courts have uniformly stated that Congress meant what it said in 15 U.S.C. § 1397(c): "[c]ompliance with any federal motor vehicle safety standard does not exempt any person from any liability under common law." Larsen; Perry. The application of the common law to the field of automotive safety has, therefore, borne actions at common law for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety devices, such as air bag systems. See, Motor Vehicle Manufacturers Association, ("[T]he automobile industry waged the regulatory equivalent of war against the airbag...[even though]...passive restraint could prevent approximately 12,000 deaths and 100,000 serious injuries annually"). Yet, during the past several years, the manufacturers have had success in convincing many courts that they should still not be held accountable for failing to install these safety systems in motor vehicles. Strangely, until this Court's decision in Cipollone, many courts "bought into" the argument of preemption advanced by the manufacturers. Only a few stalwart judicial defenders of Congress' obvious intent in the passage of the Safety Act were brave enough to "say no" to the rationale employed by many courts to preempt claims which Congress never intended to preempt. See, Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa. Super. 1989); Loulos. Then, in the "no air bag" case of Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), cert. denied (U.S. 1996)--decided shortly after Cipollone, the New Hampshire Supreme Court addressed Ford's argument that the plaintiff's claim was expressly preempted by the Safety Act as follows:

> "Although the language of the preemption clause alone might suggest that common law actions are preempted, we do not interpret the preemption clause in isolation. Rather we read the Safety Act as a whole, because 'the meaning of statutory language, plain or not, depends on context.' ...Hence we must interpret the preemption clause in tandem with the savings clause.

"The savings clause provides that 'compliance with any Federal motor vehicle safety standard...does not exempt any person from any liability under common law. ...It is difficult to imagine broader language.' ...We therefore conclude that state common law is not explicitly preempted..."[5]

Similarly, when General Motors raised the defense of express preemption to the plaintiff's no-air bag claim in Wilson v. Pleasant, 660 N.E.2d 327 (1995), the Indiana Supreme Court responded:

"...the presence of the savings clause negates any notion of express preemption of state common law claims. Therefore, we find that the Safety Act does not expressly preempt a state common law claim in this case..."

And, most recently, the Arizona Supreme Court rejected GM's arguments stating:

"In using the term 'safety standards,' Congress made clear just what it meant: 'Motor vehicle safety standards '*means a minimum standard for motor vehicle performance*, or motor vehicle equipment performance..."

These words tell us Congress gave the agency authority to adopt *minimum safety standards* to promote highway safety and reduce traffic accidents. Thus, we consider the standard as being just what Congress authorized: a minimum standard. If safety, not uniformity, is the underlying congressional purpose, the adoption of minimum standards would not ordinarily indicate that common-law liability imposed as a failure to adopt higher standards is precluded, or even in conflict with congressional intent." Munroe v. Galati, 938 P.2d 1114 (Arizona 1997).

[5] The Tebbetts case was tried to a jury and a verdict was rendered for the defendant Ford Motor Company.

B. THE SAFETY ACT SAYS THERE IS NO PREEMPTION

A reading of the Safety Act makes it clear that the preemption provision prohibits a state or political subdivision from establishing a "safety standard" that conflicts with a "Federal Motor Vehicle Safety Standard". Clearly, this phrase was intended to relate only to enactments of positive law, not common law liability. Cf. Medtronic at 2252 (citing other uses of the term "requirements" throughout a statute to demonstrate its focus is on the "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the Safety Act's preemption provision is that a "safety standard" promulgated under the Act will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.

If Congress intended the preemption provision to apply to common law claims, it would have chosen words that clearly did so. The term "safety standards" is hardly a clear reference to common law claims. See, Medtronic.

Common law claims do not set specific minimum performance standards; they focus--as motor vehicle safety standards do not--on the *manner* in which a manufacturer has chosen to achieve a reasonable level of safety, and whether certain engineering features caused the vehicle to be causatively unsafe for the foreseeable events at issue. See, Silkwood v. Kerr-McGee Corporation, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

The Congress intentionally defined a "motor vehicle safety standard" as a "minimum standard for motor vehicle performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." U.S.C. § 1391 (2). This definition plainly encompasses state statutory and administrative performance requirements and, just as plainly, does not encompass either state common law standards or jury verdicts which apply the common law in specific cases.

Finally, if Congress intended to preempt all common law claims which applied to the same manner of performance as these minimum standards, why include the Savings Clause? Such an interpretation would, by its terms, preempt virtually *all* common law claims which challenge vehicular design features that are covered by federal-minimum standards--including those claims routinely allowed by the courts over the past thirty years.[6] Hyundai Motor Company v. Alvardo, 974 S.W.2d 1 (Texas 1998).

C. THE COURT SHOULD ESTABLISH A CLEAR AND NON-INTERPRETIVE RULE THAT ABSENT A CLEAR STATEMENT FROM CONGRESS, STATE COMMON LAW CANNOT BE PREEMPTED BY FEDERAL LEGISLATION OR REGULATION

Our traditional state tort law is at risk from the Court's preemption doctrine. Year after year, this Court and lower courts have been increasingly called upon to decide whether an Act of Congress was intended to preclude civil liability at common law. Because common law actions have traditionally been preserved and entrusted to states' domain, we urge the Court to issue an Opinion which provides that state common law actions for damages receive the highest order of protection against preemption. It seems relatively easy to provide this protection if the Court will confirm that common law actions have minimal regulatory effect; if these actions have only incidental regulatory effect, then ambiguous preemptive language attempting to preempt some state regulation would not effect our citizens fundamental civil rights.[7] This approach would be one of a strict textualist and would ensure that

[6] See for example: Dawson v. Chrysler Corporation, 630 F.2d 950 (3rd Cir. 1980); Fox v. Ford Motor Company, 575 F.2d 774 (10th Cir. 1978); Sours v. General Motors Corporation, 717 F.2d 1511 (6th 1983).

[7] See, Goodyear Atomic Corp. v. Miller, 486 U.S.174, 185 (1988); English v. General Electric Co., 496 U.S.72, 85 (1990).

Congress rather than courts are assigned the task of overriding state common law.[8]

In the Lower Court, preemption was predicated upon first (relying on this Court's rationale in Myrick), concluding that even an express definition of the preemptive reach of a statute will not prevent a finding of implied preemption--it merely creates a reasonable inference that Congress did not intend to preempt other matters. After making that observation, the Lower Court then predicated its analysis upon the finding that "[t]he tension between 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) prevents the identification of any 'express definition' of the reach of preemption in the Safety Act." Having found no "express" intent of Congress, the Lower Court was "free" to ignore both the presumption against preemption and the "reasonable inference" rule established in Myrick. This somewhat convoluted rationale demonstrates the danger of allowing courts to define the scope of the preemptive effect of a federal statute on common law rights.

Because the decisions of this Court have not always provided a defining line between how one should construe a federal statute or regulation which effects common law rights versus state regulatory powers, it is time--we respectfully submit--to deal with this issue. A particular rule should be developed when the preemption of common law is at issue. We urge the Court to decide that *as long as the common law claim does not compel a manufacturer to engage in behavior barred by Congress or the relevant federal agency, a jury should be allowed to decide responsibility for harm caused.* See, Cipollone (Scalia, J., concurring in part and dissenting in part). The reason for creating a dichotomy between the interpretation of the effect of federal statutes or administrative rules on the common law versus state statutes or regulations is that unlike the kind of direct

[8] See, Raeker-Jordan, The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows The Rule, 40 Ariz. L. Rev. 1379 (1998); Corboy & Smith, Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption, 15 AM.J Trial Advoc. 435 (1992).

legislative regulation undertaken by state legislators or regulators when a state seeks to regulate behavior or activities within its territory, the goal of the common law is to simply compensate an injured victim. A common law claim does not direct a defendant to do anything other than pay a verdict; there is therefore a stark difference between a state regulatory provision and a ruling requiring compensation for injury. See, Silkwood, supra. Allowing some "tension" between federal regulations and a common law claim for damages is hardly novel. Silkwood. We, therefore, urge the Court to conclude that common law actions should only be preempted when Congress has used the words "state common law" or "all state law" in an express preemption provision, or when "compliance" with the common law claim would cause a party to violate a federal regulation or standard.[9]

D. THE LEGISLATIVE HISTORY SHOWS THERE IS NO PREEMPTION

The Safety Act's legislative history confirms that Congress intended to preserve all common law claims.

1. The Senate Bill

The bill reported out of the Senate Commerce Committee, and passed by the full Senate, contained a preemption provision similar to the bill ultimately enacted into law. See 112 Cong. Rec. 14, 257 (1966). Senator Magnuson, the sponsor of the Senate bill, stated on the floor that:

> "Compliance with federal standards would not necessarily shield any person from broad liability at common law. The *common law on product liability still remains as it was*. 112 Cong. Rec. 14, 230 (1966) (emphasis added)."

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[9] See, Raeker-Jordan, The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows The Rule, 40 Ariz. L. Rev. 1379, 1439 (1998).

2. The House Bill

The original House bill contained a preemption provision similar to the preemption provision in the Senate bill, and, like the Senate bill, it did not contain a savings provision. See H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966). During hearings on that bill, however, Tom Triplett, an attorney from South Carolina, raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> "We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> "You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be 'Brer Fox, please don't throw me in the briar patch.' If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets Government standards,' and an already compounded problem will be recompounded." *Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1249 (1966) *("House Hearings")*.

Representative Farnsley, a member of the Committee, referred to Mr. Triplett's testimony a few moments later:

> "This gentlemen has raised, perhaps not brilliantly but I think well, [a] question... He said Brer Rabbit told Brer Fox, 'Don't throw me in the briar patch...'

"...Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point...

"[T]he courts, under the old common law and our statutes, hold them responsible. Now I think we should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important." Id. at 1256-57.

Representative Mackay intervened to drive the point home:

"With regard to Title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met *minimum* safety standards. This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer*." Id. at 1260 (emphasis added).

Consistent with the foregoing, the House Committee amended the original House bill by inserting a savings provision identical in all respects to the savings provision ultimately signed into law. See 112 Cong. Rec. 19, 657 (1966) (emphasis added).

A tort judgment establishes only that a manufacturer failed to conform to a generalized standard of care, rather than establish an "objective criteria" for all products. Choosing its words carefully, there is no reason to find that Congress intended to alter the common law or its potential effect on car manufacturers. Hyundai Motor Company v. Alvarado, supra.

E. ANALYSIS OF FEDERAL MINIMUM

STANDARD 208

Given Congress' clear and unequivocal preservation of all common law claims, the history of Standard 208 is not particularly relevant to the preemption issue presented in this case. However, we briefly review Standard 208's long and convoluted history to make a critical point: not once in its "history" did the NHTSA suggest that Standard 208 was intended to preempt common law claims.

In 1967, the federal agency responsible for implementing the Safety Act--the National Highway Transportation Safety Administration ("NHTSA")--issued Standard 208, requiring all manufacturers to install passive restraints by the early 1970's. 32 Fed. Reg. 2408 (Feb. 3, 1967). After the Chairmen and Presidents of General Motors, Ford Motor Company and Chrysler Corporation personally met with President Nixon and John Erlichman in the Oval Office and complained about the agency's action, the President ordered the passive restraint requirement rescinded. See National Archives Transcript, "Part of a Conversation Among President Nixon, Lee Anthony Iacocca, Henry Ford II, and John D. Erlichman in the Oval Office on April 27, 1971, between 11:08 and 11:43 a.m."; 37 Fed. Reg. 3911 (Feb. 24, 1972). From 1974 through 1976, General Motors nevertheless manufactured 10,000 cars with airbags, but it did virtually nothing to market them; GM salesmen actually discouraged consumers who expressed interest in purchasing cars with airbags. See "Saga of the Air Bag, or the Slow Deflation of a Car-Safety Idea." *The Wall Street Journal*, November 11, 1976. Secretary Brock Adams issued a regulation requiring passive restraints in all large cars manufactured after September 1, 1981, and all cars manufactured after September 3, 1983. 42 Fed. Reg. 34289 (July 5, 1977). Seven months before the first deadline, however, new Transportation Secretary Drew Lewis delayed, and then rescinded, that order. 46 Fed. Reg. 12033 (Feb. 12, 1981); 46 Fed. Reg. 53419 (Oct. 29, 1981). In June 1983, this Court held that the rescission of Standard 208 by Secretary Lewis was arbitrary and capricious.

"For nearly a decade, the automobile industry waged

> the regulatory equivalent of war against the airbag and lost--the inflatable restraint was proven sufficiently effective... But the agency not only did not require compliance through airbags, it did not even consider the possibility in its 1981 rulemaking. Motor Vehicle Manufacturers Association, at 2869-70.

In July 1984, Secretary of Transportation Elizabeth Dole reinstated the passive restraint requirement, with a phase-in period beginning September 1, 1986, and full implementation required September 1, 1989. 49 Fed. Reg. 28962 (July 17, 1984). Secretary Dole went to some length explaining that the safest system was precisely the one that the plaintiffs seek to prove was an available, safer design in this case: "*...the most effective system is an airbag plus a lap and shoulder belt.*" Id. at 28986 (emphasis added). Nevertheless, concerned that industry opposition to an airbag mandate would lead the public to be unduly resistant to implementation of this "most effective system," Secretary Dole decided not to require only airbags in all cars. Instead, she ordered some form of passive restraints to be installed. Id. at 28963. In so doing, she explicitly noted comments that the auto manufacturers could be sued by crash victims who were injured because their cars lacked airbags:

> "Another potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> "If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an airbag can sue the car manufacturer to recover the dollar value of the injury." Id. at 28972.

And, when confronted with criticism that the manufacturers would

use the cheapest system to comply with the automatic restraint system requirement, Dole said, "The Department does not agree with this contention. It believes that competition, *potential liability for any deficient system*, and pride in one's product would prevent this." 49 Fed. Reg. 29000 (1984) (emphasis added).

F. A FINDING OF PREEMPTION WILL ALLOW VEHICLE MANUFACTURERS TO ESCAPE LIABILITY FOR DEFECTIVE PRODUCTS THAT DIRECTLY CAUSE INJURY

The relief obtained by the Lower Court's ruling has cloaked the defendant vehicle manufacturer with immunity. If this ruling is correct then it can impart protection against common law liability in many other cases. A few examples will, we hope, suffice. In the mid-1970s, Ford Motor Company marketed the Ford Pinto. This car complied with one of the performance options of FMVSS 301. Nevertheless, consumers had every right to challenge the design of that product when they or their loved ones became involved in a fiery crash. Likewise, every car sold in this country by American manufacturers between 1975 and 1989 complied with FMVSS 208 by installing a lap belt only system in the rear seat. That installation satisfied one of the options of the latter standard. Nevertheless, the use of only a lap belt can, under forseeable circumstances, cause catastrophic injury--which is avoidable by the installation of lap and shoulder belt systems marketed by American manufacturers in their vehicles sold in other countries during this same time period. Should manufacturers be held accountable for neglecting the design of cars and trucks in this country because they complied with bare minimum safety standards?[10] Would such immunity further aid or

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[10] In the mid to late 1980's, there were hundreds of accounts of children and adults suffering spinal cord and head injury while lap seat belted in the rear seats of American made cars. Over the course of about 10 years, most of these Americans either went to trial or settled their products liability claims with the car companies. See, Garrett v. Ford Motor Co., 684 F.Supp. 407 (D. Md. 1987). During this period of time, these lap belt installations met one of the optional choices of FMVSS 208. Congress conducted special hearings regarding the safety of a

retard the express purpose of the Safety Act? We believe the answer is very obvious. In truth, allowing common law actions to challenge vehicle manufacturers who have merely met the bare minimum requirements of federal regulations serves to *compliment* rather than conflict with these standards. The common law serves to motivate manufacturers to build better and safer products--which was, of course, the true goal of the Congress which passed the Safety Act. A jury verdict that compensates a consumer for injury because a motor vehicle was built with the minimum safety in restraint, or poor fuel system integrity, or roof crush strength, or door latch security does not truly conflict with minimum federal standards. Instead, it asks that manufacturers be held responsible for injury caused because it did not design above these minimum criteria. Viewed as "complimentary" rather than conflicting, preemption cannot be obtained. Cf. Unum Life Insurance Co. of America v. Ward, 119 S.Ct. 1380 (1999).[11]

G. AN IMPLIED PREEMPTION ANALYSIS DOES NOT WARRANT THE FINDING THAT PLAINTIFFS' CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE THEY DO NOT CONFLICT WITH NHTSA REGULATIONS

Assuming there is a necessity to employ principles of implied preemption, there is no preemption here since plaintiffs' claims do not conflict with NHTSA's regulations. Plaintiffs do *not* contend that Honda should have chosen a different "option" under Standard 208. Rather, plaintiffs maintain that Honda should have

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standard only requiring lap belts, but before NHTSA announced its proposal to require lap/shoulder belts (already installed by European manufacturers), the American companies announced their decision to make this needed change. This course of events vividly demonstrated the societal importance of the common law.

[11] In the instant case, allowing for potential liability for not including both a seat belt and an air bag cannot be fairly viewed as creating a conflict rising to preemptive status. These restraints compliment each other to provide the safest means available today.

done more than meet the bare minimum required by the "option" it chose. Honda was plainly free to install an airbag--as a safety *addition* to the design of its product. Allowing a jury to decide if Honda is liable for failing to design a safe car without the addition of an air bag does not deprive Honda of the "option" it chose.

Any argument that the failure to install airbags would deprive Honda of its federally mandated "option" to choose among the design choices set forth in Standard 208 is wrong for two reasons. First, we need to be reminded that Congress did not entertain providing manufacturers with optional methods for complying with these minimum standards. That was an agency decision. Nevertheless, many federal vehicle standards permit design "options," some implicitly and others explicitly.[12] Nothing in the Safety Act or its legislative history suggests that the preemptive effect of a federal standard turns on whether it implicitly or explicitly permits such choices. Minton v. Honda of America, 684 N.E.2d 648 (Ohio 1997); Munroe, supra. As the Supreme Court of Indiana stated in Wilson v. Pleasant, 660 N.E.2nd at 339 (footnotes deleted):

> "Just as the Pokorny v. Ford Motor Company, 902 F.2d 116 (3rd Cir. 1990) court did not find establishing uniform national standards to be Congress's primary purpose in enacting the Safety Act, neither do we find encouraging flexibility and choice to be primary purpose... Congress declared the Safety act's purpose "to reduce traffic accidents

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[12] Standard 208 is not unique in explicitly providing optional means of compliance. See, *e.g.*, Standard 101 (controls and displays); Standard 105 (hydraulic brake systems); Standard 106 (brake hoses); Standard 108 (lamps, reflective devices, and associated equipment); Standard 111 (rear view mirrors); Standard 120 (tire selection and rims); Standard 125 (warning devices); Standard 201 (occupant protection in interior impact); Standard 202 (head restraints); Standard 203 (steering control system); Standard 205 (glazing materials); Standard 207 (seating systems); Standard 213 (child restraint systems); Standard 217 (bus window retention and release). 49 C.F.R. § 571.101 *et seq.* (1986).

and deaths and injuries to persons relating from traffic accidents." Congress thought that preserving common law claims would further that goal... Excising the effect of that provision from the Act in the name of providing manufacturers flexibility and choice in our view contradicts the primary purpose of the Act."

See also, Hyundai Motor Company v. Alvarado, supra. 974 S.W.2d at 11. The Congress that enacted the Safety Act was completely unaware of the methodology that NHTSA might employ in the future to avoid state agencies throughout the country from imposing different equipment regulations. Congress' concern was to provide for uniformity in government imposed regulations and nothing more.

> "...Congress gave the agency authority to adopt *minimum safety standards* to promote highway safety and reduce traffic accidents... If safety, not uniformity, is the underlying congressional purpose, the adoption of minimum standards would not ordinarily indicate that common -law liability imposed as a failure to adopt higher standards is precluded, or even in conflict with congressional intent." Munroe v. Galati, supra. 938 P.2d at 1118-1119.

In Myrick, this Court said that there was no conflict because "Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices." Id. NHTSA, of course, has not ordered auto manufacturers to refrain from using airbags either. Standard 208 does not impose any requirements "one way or the other" about the use of airbags--its just one option. Given NHTSA's recognition, however, of the benefits of airbag technology, it makes no sense to argue that plaintiffs' claims

frústrate purposes of the federal regulatory program.[13]

CONCLUSION

American common law is traditionally the guage of human decency and fair play. The common law allows average Americans, as jurors, to judge the actions or omissions of their fellow citizens. One can honestly say that without the common law many people would behave badly with impunity. Often, particularly when the acting party is a large business, inappropriate behavior goes without a remedy. Nevertheless, our common law gives each of us the opportunity to register our complaint and have our fellow citizens judge the rightness or wrongness of the conduct of another.

Compliance with the Safety Act and the minimum standards set forth therein allow automotive manufacturers to sell cars in this country--nothing more. The purpose of the Safety Act was to protect consumers, not to shield manufacturers from liability. To paraphrase Justice Blackmun's concurrence in Cipollone, by finding federal preemption of certain state common-law damage claims, the Court eliminates a "critical component" of the States' ability to protect the health and safety of its citizens. Thus, only when there is clear evidence that Congress intended such a result will preemption be found. Honda cannot demonstrate that Congress intended to displace our civil justice system as the forum for the resolution of the plaintiff's claims. The Safety Act means what it says: common law claims are not preempted. This Court should not condone preemption by regulatory fiat. Particularly when reliance upon such regulation can lead to the sale of a product which is not nearly as safe as one containing additional safety features. Congress did not

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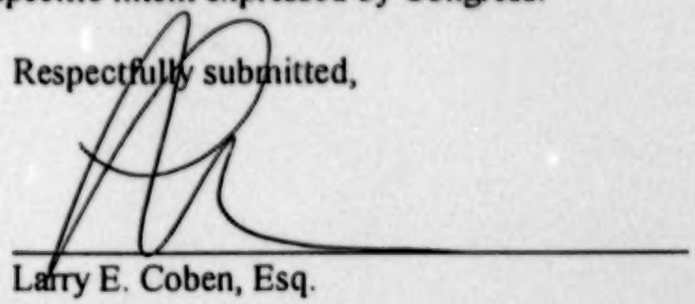
[13] One of the defendant's arguments or that of an Amici may be that Congress endorsed preemption by adopting the Intermodel Surface Transportation Efficacy Act. Congress did no such thing. It said the legislation "is not to be a 'sword' or a 'shield' in litigation or otherwise; and, it acknowledged the current status of cases going both ways on the issue of preemption. H.R.Rep. No. 12-404, 102d Cong., 1st Sess., at 401 (1991).

intend or expect that manufacturers would be able to escape responsibility for their conduct by hiding behind compliance with these minimum standards.

It is illogical, we submit, to contend that when NHTSA decided on three optional choices for compliance with FMVSS 208, it intended to ban lawsuits alleging cars or trucks or vans defective absent a supplemental air bag system. We know that Congress did not choose to occupy the field of tort law on this topic, and that conflict preemption is not appropriate.

For all of the reasons set forth above, this Court should reverse the decision of the Court of Appeals, and establish once and for all that state common law claims will be treated as off limits to preemption absent a specific intent expressed by Congress.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a the original *Brief of the Attorneys Information Exchange Group as Amicus Curiae in Support of Petitioners* was filed with the Clerk of the Court, sent via Overnight Federal Express, with a copy forwarded via Overnight Federal Express, this 19th day of October, 1999, to the following:

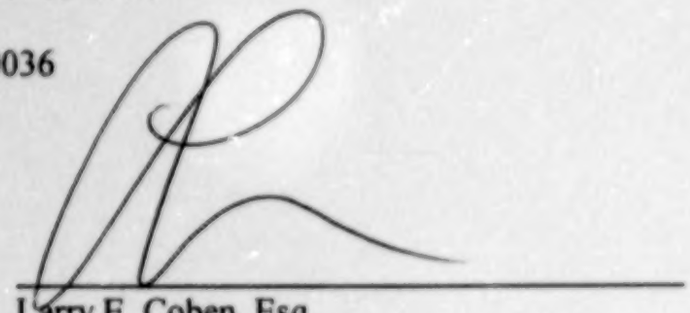
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